UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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EHSAN ELAHI, :

Petitioner, :

-against- : No. 3:02CV0789(GLG)
MEMORANDUM DECISION
JOHN ASHCROFT, Attorney :
General of the United States,
:
Respondent.
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Respondent has moved to dismiss the Petition for Writ of Habeas Corpus **[Doc. # 1]** for lack of subject matter jurisdiction and to lift the stay of removal proceedings previously entered by this Court **[Doc. # 4].** Respondent asserts that the petition fails to raise any colorable claim of legal error or issue of law and should therefore be dismissed for lack of subject matter jurisdiction. See Sol v. INS, 274 F.3d 648, 651 (2d Cir. 2001)(holding that § 2241 habeas relief is not available to review factual or discretionary decisions by the Immigration Judge ("IJ") and the Board of Immigration Appeals ("BIA")). Respondent argues that the petition challenges only the factual findings of the IJ and the BIA that Petitioner was not credible because of his vague and uncorroborated testimony and that there was no meaningful evidence to support his application for asylum. Therefore, Respondent asserts that this Court must dismiss

the petition for lack of subject matter jurisdiction.

Petitioner responds that Respondent has mischaracterized his petition. He states that his claim is not that there were factual errors made during the administrative proceedings, but rather that his constitutional right to due process under the Fifth Amendment was violated due to his attorney's lack of competence. Additionally, he claims that he is under a medical handicap that affects his memory and, therefore, he was unable to effectively present his own case. Petitioner argues that the IJ's and BIA's decisions overlooked the fact that his counsel (who has since been disbarred) refused to conduct direct examination during the immigration proceedings and failed to introduce documents that would have supported Petitioner's claims regarding his past persecution. (Pet'r's Mem. in Supp. of Habeas Pet. at 2; Pet'r's Reply to Resp. at 4-5.)

Discussion

Petitioner, who is a native and citizen of Pakistan, entered the United States on December 12, 1992, on a false passport and, in 1993, applied for political asylum. Following a hearing at which Petitioner was represented by counsel and at which an interpreter was present, his application for asylum was denied by the IJ on January 29, 1996. On December 1, 1997, the BIA denied his appeal. Petitioner has been in the custody of INS since April 4, 2002.

On May 7, 2002, Petitioner, represented by new counsel, filed

the instant petition for writ of habeas corpus, claiming only that his continued detention by INS and his denial of asylum are wrongful. The petition does not mention a violation of Petitioner's due process rights nor claim ineffective assistance of counsel. However, the accompanying memorandum, which is incorporated by reference in the petition, if construed liberally, could be read to raise an ineffectiveness claim.[1] This claim is expressly advanced by Petitioner in his opposition to the motion to dismiss, which states that the ground for his habeas petition is an alleged violation of his rights under the Fifth Amendment caused by the ineptitude of his lawyer during the immigration proceedings. (Pet'r's Reply to Resp. at 5.) There is no other constitutional claim made.

Therefore, to the extent that Petitioner is asserting a Fifth Amendment ineffectiveness of counsel claim, that constitutional claim is cognizable on a federal habeas petition over which we have jurisdiction under 28 U.S.C. § 2241. Accordingly, the motion to dismiss is denied on that basis.

However, Respondent also challenges our jurisdiction over this petition based upon Petitioner's failure to exhaust administrative

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[1] In his accompanying memorandum, Petitioner complains that the IJ and BIA overlooked the fact that Petitioner's counsel refused to conduct direct examination, which required Petitioner to prepare his own case. (Pet'r's Mem. at 2.) He also mentions that his attorney has been disbarred and discusses the fact that his counsel failed to provide documents to support his claim for asylum. Id.

remedies. 8 U.S.C. § 1252(d)(1). In Arango-Aradondo v. INS, 13 F.3d 610, 614 (2d Cir. 1994), the Second Circuit addressed the question of whether an ineffective assistance claim based on a failure to present evidence must first be raised with the BIA in a motion to reopen. The Court held that, although the BIA does not have the authority to adjudicate constitutional issues, the BIA can reopen the proceedings to allow a petitioner to supplement the record in appropriate cases. Consequently, the Court held that the petitioner was required to raise his claim in the first instance with the BIA since it involved procedural errors correctable by the administrative tribunal. Id. The Court then addressed the question of whether the exhaustion requirement is "jurisdictional or simply prudential." Id. Noting a split in the circuits on this issue, the Second Circuit sided with those courts that have held that the failure to move to reopen does not preclude jurisdiction because motions to reopen are discretionary, rather than a remedy of right. Id. (citing Rhoa-Zamora v. INS, 971 F.2d 26, 31 (7th Cir. 1992), cert. denied, 507 U.S. 1050 (1993)). Nevertheless, from a "prudential" standpoint, the Court held that ineffectiveness claims should be decided by the BIA in the first instance so as to avoid any premature interference with the agency's processes and to afford the parties and court the benefit of the agency's expertise. Id.

Subsequently, in Rabiu v. INS, 41 F.3d 879, 882 (2d Cir. 1994),

the Court addressed the exhaustion requirement in a case where the petitioner was asserting an ineffectiveness claim based upon his counsel's failure to meet a deadline set by the IJ for filing an application for a discretionary waiver under the Immigration and Nationality Act ("INA") § 212(c). Respondent argued that petitioner's failure to raise this in his BIA appeal barred consideration of his claim. The Second Circuit, citing Arango-Aradondo, reiterated that this was not a jurisdictional bar. Because this argument had been presented in a brief filed with the BIA after its decision on appeal but before it ruled on the motion to reopen, the Court held that the prudential concerns raised in Arango-Aradondo were not present Therefore, the Court proceeded to consider the ineffectiveness claim.

In the instant case, it does not appear that a motion to reopen was ever filed with the BIA nor that the issue, framed in terms of a due process claim, was ever presented to the BIA. However, what is clear from the BIA's decision is that the grounds now asserted by Petitioner for his ineffectiveness claim were presented and considered by the BIA. The Petitioner argued before the BIA that the IJ did not fully consider or appreciate his medical condition. (BIA Dec. at 2 & n.2.) The BIA also discussed counsel's failure to conduct direct examination as well as his failure to present supporting documentation. (BIA Dec. at 2). Therefore, like the situation in Rabiu, the prudential concerns that were present in

Arango-Aradondo are not present here, and we will consider Petitioner's ineffectiveness claim in connection with this habeas petition.

Turning to the merits of Petitioner's constitutional claim, the record of the hearing reflects that although Petitioner's counsel did not conduct any direct examination of Petitioner regarding the reasons for his seeking asylum, he did question Petitioner on direct about his medical condition for purposes of establishing his competency to testify. (Hr'g Tr. at 18-22, 24-29.) He also introduced as an exhibit Petitioner's request for asylum which had been prepared four years earlier[2] and which contained a detailed addendum setting forth the reasons Petitioner sought asylum. At the hearing Petitioner twice swore that the addendum was true and correct. (Hr'g Tr. at 17 & 29.) From the transcript, it appears that counsel made a deliberate decision to waive direct examination so that he could rely on the asylum request and addendum. When questioned by the IJ if he was waiving direct, he responded: "Yes. Okay. It's already in as Exhibit No. 2 [the asylum application]." (Hr'g Tr. at 29.)

Additionally, contrary to Petitioner's assertions, counsel questioned Petitioner at length on redirect concerning the grounds for his

[2] The three-year delay was occasioned by Petitioner's medical treatment. (Oral Dec. of IJ at 6.)

asylum claim. (Hr'g Tr. 36-51.) Counsel elicited testimony from Petitioner regarding his party membership in the Pakistan Peoples Party ("PPP"), why he left Pakistan, about beatings and arrests by the police of PPP political workers, his own arrests for political reasons, the work that he did for the PPP, the political situation in Pakistan as of the date of the hearing, Petitioner's fears and his family's fears for his safety, information about the opposition party that was in power, his involvement in the 1990 elections in Pakistan, and how members of the PPP had been arrested on false charges and were released only after bribing the police. (Hr'g Tr. 36-53.)

The Second Circuit has held that deportation proceedings are civil, not criminal, proceedings, and in order for a petitioner to prevail on a claim of ineffective assistance of counsel, he "must show that his counsel's performance was so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause." Saleh v. United States Dep't of Justice, 962 F.2d 234, 241 (2d Cir. 1992). "In order to show a deprivation of fundamental fairness, [Petitioner] must allege facts sufficient to show (1) that competent counsel would have acted otherwise, and (2) that he was prejudiced by his counsel's performance." Rabiu, 41 F.3d at 882 (internal quotations and citations omitted). "A reviewing court uses its own judgment to determine whether an attorney's conduct was ineffective." Id.

Our review of the hearing transcript indicates that Petitioner's counsel's performance was not so ineffective as to have impinged upon the fundamental fairness of the hearing. Counsel introduced and relied upon the asylum petition with its detailed addendum. He also conducted an extensive examination of Petitioner, albeit on redirect. Although there was a dearth of documentary evidence introduced to support Petitioner's claims of persecution, it is not at all clear that such documentary evidence exists or that it would have affected the outcome. See Mezrioui v. INS, 154 F. Supp. 2d 274, 280 (D. Conn. 2001)(holding that in order to make out the "actual prejudice" prong for an ineffective assistance claim, petitioner must make a prima facie showing that he would have been eligible for the relief sought and that he could have made a strong showing in support of his application). As the BIA noted in its decision, Petitioner's testimony did "not suggest that he was either so prominent or his conduct so conspicuous that he would be sought out for harm even now." (BIA Dec. at 2.) Moreover, as Petitioner points out (Pet'r's Reply to Resp. at 5), the IJ relied on the State Department's Report, which indicated that any basis for fear of mistreatment on account of membership in the PPP was less than credible, particularly since the elections, when the "PPP took over the prime ministership and other strong positions in the legislature." (IJ Oral Dec. at 11.) Thus, Petitioner has made no

showing that he would have been eligible for asylum had his counsel introduced documentary evidence to support his testimony.

In response to the motion to dismiss, Petitioner raised the argument that his fear of future prosecution should be judged by today's standards and not those of six years ago (when the hearing took place). (Pet'r's Reply to Resp. at 5.) To the extent that Petitioner might now be able to show that he is entitled to asylum based on a change in conditions in Pakistan since the hearing in 1996, we note that INA § 208(a)(2)(D) of the Immigration & Nationality Act, 8 U.S.C. § 1158(a)(2)(D), provides that successive asylum petitions may be considered "if the alien demonstrates to the satisfaction of the Attorney General . . . the existence of changed conditions which materially affect the applicant's eligibility for asylum. . . ." See also 8 C.F.R. § 208.4(a)(4)(defining "changed circumstances") and 8 C.F.R. § 3.2(c)(3)(ii)(stating that the 90-day time limitation for filing a motion to reopen does not apply to motions to reopen proceedings to reapply for asylum based on changed circumstances). Obviously, whether Petitioner is entitled to asylum based upon changed conditions is an issue we are not authorized to address. See Najjar v. Ashcroft, 257 F.3d 1262, 1281 n.8 (11th Cir.), reh'g denied and reh'g en banc denied, 275 F.3d 1085 (11th Cir. 2001).

Conclusion

Acccordingly, Respondent's Motion to Dismiss for lack of subject matter jurisdiction is DENIED **[Doc. # 4]**. The Petition for Writ of Habeas Corpus is DENIED **[Doc. # 1]**. The Stay of Deportation is LIFTED **[Doc. # 3]**. The Clerk is directed to enter judgment accordingly and to close the file.

SO ORDERED.

Date: October 28, 2002.
Waterbury, Connecticut.

_____/s/_____
GERARD L. GOETTEL,
United States District Judge